LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
NOV 18 1971
E. ROBERT SEAVER, CLERK

71-672

No. 71-

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, PETITIONER

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ERWIN N. GRISWOLD,
Solicitor General,
HENRY E. PETERSEN,
Acting Assistant Attorney General,
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	4
Reasons for granting the writ	6
Conclusion	14
Appendix A	16
Appendix B	17
Appendix C	18
Appendix D	19

CITATIONS

Cases:

Boyd v. *United States*, 116 U.S. 616	7
Coffey v. *United States*, 116 U.S. 436	6, 12
Helvering v. *Mitchell*, 303 U.S. 391	7, 12, 13, 14
Leiser v. *United States*, 234 F. 2d 648, cert. denied, 352 U.S. 893	8, 9, 11
Murphy v. *United States*, 272 U.S. 630	7
Neaderland v. *C.I.R.* 424 F. 2d 639	7
Rex Trailer Co., Inc. v. *United States*, 350 U.S. 148	7, 13, 14
Stone v. *United States*, 167 U.S. 178	12
Telephone News System, Inc. v. *Illinois Bell Telephone Co.*, 220 F. Supp., affirmed, 376 U.S. 782	13
United States v. *Alcatex, Inc.*, 328 F. Supp. 129	9, 14
United States v. *Beacon Brass Co., Inc. et al.*, 344 U.S. 43	10

Cases—Continued
United States v. *Burch*, 294 F. 2d 1 7
United States v. *Gramer*, 191 F. 2d 741 7
United States v. *One Dodge Sedan*, 113 F. 2d 552 7
United States v. *One Lot Emerald Cut Stones and One Ring* (S.D. Fla., No. 70–1310, decided Sept. 17, 1971) 7–8
United States v. *1953 Oldsmobile*, 222 F. 2d 668 7
United States v. *Physic*, 175 F. 2d 338 7
United States v. *29 Strings Seed Pearls*, 34 F. 2d 142 ..... 7, 9
United States v. *United States Coin and Currency*, 401 U.S. 715 7
United States ex rel. Marcus v. *Hess*, 317 U.S. 537 7
Various Items of Personal Property v. *United States*, 282 U.S. 577 7
Constitution and statutes:
United States Constitution, Fifth Amendment 9, 13
18 U.S.C. 542 10
18 U.S.C. 545 ..... 2–3, 5, 6, 8, 9, 10, 11, 12, 13, 14
18 U.S.C. 1084(d) 13
19 U.S.C. 1337(f) 5
19 U.S.C. 1459 ..... 3, 5, 10
19 U.S.C. 1460 ..... 3–4, 5, 6, 8, 9, 10, 11
19 U.S.C. 1592 10
Miscellaneous:
33 F.R. 12680 (T.D. 68–225) 5
H. Rep. No. 304, 80th Cong., 1st Sess 12

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

UNITED STATES OF AMERICA, PETITIONER

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, p. 16) is not yet reported. The opinion of the district court (App. D, *infra*, pp. 19–22) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 17) was entered on July 13, 1971. A petition for rehearing was denied on August 20, 1971 (App. C, *infra*, p. 18). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an acquittal of the owner of merchandise on criminal charges alleging unlawful importation of that merchandise into the United States, in violation of 18 U.S.C. 545, bars a subsequent civil forfeiture proceeding directed against the same property that was the subject of the criminal action.

STATUTES INVOLVED

Section 545 of Title 18, United States Code, provides, in pertinent part:

> § 545. Smuggling goods into the United States.
>
> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
>
> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

* * * * *

Section 1459 of Title 19, United States Code, provides in pertinent part:

The master of any vessel of less than five net tons carrying merchandise and the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vessel or vehicle shall cross the boundary line or shall enter the territorial waters of the United States, and if such vessel or vehicle have on board any merchandise, shall produce to such customs officer a manifest as required by law, and no such vessel or vehicle shall proceed farther inland nor shall discharge or land any merchandise, passengers, or baggage without receiving a permit therefor from such customs officer. * * *

Section 1460 of Title 19, United States Code, provides in pertinent part:

The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this title, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise

is imported or brought into the United States in any vessel or vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifest for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle; or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported or after such report but without a permit; the master of the vessel or the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged, or landed.

STATEMENT

On October 23, 1970, the United States commenced a civil forfeiture action in the United States District Court for the District of North Dakota against

204 fifty-pound bags of Furazolidone[1] seized on June 27, 1969, by Bureau of Customs agents from one Alvin L. Malz. The complaint alleged that the Furazolidone had been introduced into the United States from a contiguous territory without having been reported to customs officials, in violation of 19 U.S.C. 1459, and that the merchandise had been smuggled and clandestinely introduced into the United States, in violation of 18 U.S.C. 545. Forfeiture was sought pursuant to both 19 U.S.C. 1460 and 18 U.S.C. 545.

Malz, the owner of the Furazolidone, successfully moved to intervene as a party defendant.

Malz had been previously charged in a two-count indictment with having knowingly and willfully smuggled and clandestinely introduced merchandise (the Furazolidone) into the United States (Count I), and with having knowingly received, concealed and facilitated the transportation of merchandise unlawfully introduced into the United States (Count II), in violation of 18 U.S.C. 545. On January 15, 1970, after a jury trial in the United States District Court

[1] Furazolidone is a concentrated animal feed additive covered by U.S. Patent No. 2,742,462, owned by Norwich Pharmacol Co. of New York, and is distributed commercially by Norwich. On September 6, 1968, the Commissioner of Customs announced that, pursuant to the provisions of 19 U.S.C. 1337(f), all importation of Furazolidone was prohibited unless a bond equal to the domestic value of the chemical was posted with the Bureau of Customs. 33 F.R. 12680 (T.D. 68-225). The restriction, to assure that all imported Furazolidone was exported to a foreign country in the same condition as imported, in effect prohibited the importation of Furazolidone for domestic use.

for the District of Minnesota; he was acquitted on both counts.

In the forfeiture proceeding, Malz moved for summary judgment and return of the Furazolidone on the ground that his acquittal of the criminal charges constituted a bar to any subsequent forfeiture proceeding. The district court (App. D, *infra*, pp. 19–22), relying on *Coffey v. United States*, 116 U.S. 436, held that the acquittal was a bar to subsequent civil forfeiture proceedings brought under the same statutory provision that served as a basis for the criminal indictment (Section 545). It further held that the civil action could not be maintained under some other forfeiture provision (*i.e.*, 19 U.S.C. 1460), apparently on the ground that, because the government had elected to prosecute Malz under Section 545, it was restricted to the forfeiture provision of that section. The court of appeals affirmed *per curiam* (Pet. App. A, *infra*, p. 16), and denied a petition for rehearing *en banc* (App. C, *infra*, p. 18).

REASONS FOR GRANTING THE WRIT

The extent to which civil forfeiture is an available remedy for confiscating goods unlawfully introduced into the United States, despite the fact that the owner thereof may have been acquitted on criminal charges of himself willfully smuggling the merchandise into the country, remains unsettled under prior decisions of this Court. The early case of *Coffey v. United States*, *supra*, on which the courts below relied, has been significantly undermined by later deci-

sions of this Court (*Murphy* v. *United States*, 272 U.S. 630; *Various Items of Personal Property* v. *United States*, 282 U.S. 577; *Helvering* v. *Mitchell*, 303 U.S. 391; *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537; *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148), causing many lower courts to question seriously the continuing vitality of the *Coffey* ruling, which bars the foreclosure of property that was the subject of an unsuccessful criminal prosecution. See, *eg.*, *United States* v. *1953 Oldsmobile*, 222 F. 2d 668 (C.A. 4); *United States* v. *One Dodge Sedan*, 113 F. 2d 552 (C.A. 3); *United States* v. *Gramer*, 191 F. 2d 741 (C.A. 9); *United States* v. *20 Strings Seed Pearls*, 34 F. 2d 142 (S.D.N.Y.); *United States* v. *Burch*, 294 F. 2d 1 (C.A. 5); and cf. *United States* v. *Physic*, 175 F. 2d 388 (C.A. 2); *Neadeland* v. *C.I.R.*, 424 F. 2d 639 (C.A. 2). Moreover, dictum in the recent decision in *United States* v. *United States Coin and Currency*, 401 U.S. 715, 718,[2] raises an important question concerning the nature of forfeiture proceedings which needs a definitive answer by this Court. At least one district court has already interpreted that decision broadly as holding all forfeiture proceedings to be punitive. *United States* v. *One Lot Emerald Cut Stones and*

[2] Quoting from *Boyd* v. *United States*, 116 U.S. 616, 634, the Court stated: "'proceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offenses committed by him*, * * * are in their nature criminal' for Fifth Amendment purposes" (emphasis added, in *Coin and Currency*).

One Ring, S.D. Fla., No. 70–1310, decided September 17, 1971.

This case affords an appropriate opportunity for this Court to reexamine the relationship between criminal sanctions and forfeiture penalties in general, and to consider the effect of an acquittal for smuggling under 18 U.S.C. 545 on any subsequent forfeiture proceeding predicated upon the same transaction in particular. It is the government's position that many forfeiture proceedings, particularly those involving illegally imported merchandise, are by nature essentially preventive or remedial, and that, where merchandise is shown to have been unlawfully introduced into the United States, an acquittal on a criminal charge of illegal smuggling is not a bar to a subsequent civil forfeiture, either under 18 U.S.C. 545 or under 19 U.S.C. 1460. The First Circuit has so held in *Leiser* v. *United States*, 234 F. 2d 648 (C.A. 1), certiorari denied, 352 U.S. 893, where forfeiture was decreed under 18 U.S.C. 1497 after the owner had been acquitted of criminal charges under 18 U.S.C. 545. The decision of the Eighth Circuit in this case thus presents a square conflict with the First Circuit's ruling which should be resolved by this Court.

1. The present case can be disposed of most easily by holding that the merchandise was subject to forfeiture under 19 U.S.C. 1460. That section decrees forfeiture of any merchandise brought into the United States from a contiguous country which has not been reported for inspection. It does not require proof of an intent to defraud, but merely provides a civil sanc-

tion for violation of the customs law. The purpose of the statute is clearly remedial—*i.e.*, to prevent forbidden merchandise from circulating in the country, to provide a reasonable form of liquidated damages for violation of the inspection provisions and to reimburse the government for investigating expenses (cf. *United States* v. *Alcatex, Inc.*, 328 F. Supp. 129, 132 (S.D.N.Y.). Moreover, the nature of the proof necessary to establish a basis for forfeiture differs significantly from that required to establish a criminal violation; the issue of knowledge or intent, which is central in a criminal prosecution under 18 U.S.C. 545, is not relevant to a determination that the government is entitled to forfeiture of the questioned merchandise under 19 U.S.C. 1460. See *Leiser* v. *United States*, *supra*, 234 F. 2d at 650; and cf. *United States* v. *29 Strings Seed Pearls*, 34 F. 2d 142 (S.D.N.Y.). Consequently, permitting the government to proceed against the property under 19 U.S.C. 1460, notwithstanding an earlier acquittal on criminal charges, conflicts with neither the Double Jeopardy Clause of the Constitution (United States, Constitution, Fifth Amendment) nor the settled doctrine of *res judicata*.

Nor do we agree with the courts below that the government is foreclosed from seeking forfeiture under 19 U.S.C. 1460 because it attempted initially to obtain a criminal conviction under 18 U.S.C. 545, which contains its own forfeiture clause. Section 1460 applies to merchandise brought from contiguous countries and in effect imposes a duty to present the merchandise for inspection. As already noted, crim-

inal intent is irrelevant to enforcement. Considering the many persons who cross our borders, there is a special reason for the penalty of civil forfeiture without any showing of willful culpability. There is thus no reason to believe that 18 U.S.C. 545 necessarily provides an exclusive remedy which precludes an action under 19 U.S.C. 1460 for the forfeiture of merchandise imported without compliance with the reporting provisions of 19 U.S.C. 1459. Cf. *United States v. Beacon Brass Co., Inc., et al.*, 344 U.S. 43.

The district court stated (App. D, *infra*, p. 22): "* * * if Congress intended to provide such an alternate [forfeiture] procedure to that contained in 18 U.S.C.A. § 545 when a violation thereof is alleged, it could have set forth, as it did in 18 U.S.C.A. § 542, a reservation that 'nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.'" But, Section 542, unlike Section 545, contains no forfeiture provision of its own.[3] Consequently, it seems clear that the reservation in Section 542 was intended to assure that both civil and criminal sanctions applied to the same prohibited acts (see, *e.g.*, 19 U.S.C. 1592). Such additional assurance was deemed unnecessary in Section 545, however, because of the explicit reference to forfeiture already contained in that provision. Nor is there anything in the statute or the legislative history to suggest that Congress intended the Section 545

[3] Section 542 prohibits the entry or introduction into the United States of imported merchandise "by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement * * *."

forfeiture to be exclusive. In the absence of a clear congressional mandate, the government should not be held to make an election of the basis for forfeiture of merchandise by instituting a criminal prosecution. See *Leiser* v. *United States, supra.*

2. Even if civil forfeiture under Section 1460 were not available in this case—and we think it is—the government should be permitted to obtain the questioned merchandise under the forfeiture clause of Section 545, which pertains to merchandise "introduced into the United States in violation of this section"—*i.e.*,[4] merchandise willfully smuggled into the United States. To be sure, the relationship between the criminal sanction and the forfeiture penalty presents a more complex issue when dealing with the same statutory provision than when forfeiture of the property is sought under the separate provision in 19 U.S.C. 1460. In the former context, the nature of the forfeiture remedy and the degree of proof required to establish a basis for forfeiture is not as clear.

The forfeiture clause of Section 545 does seem to require some proof of intent to defraud on the part of someone responsible for the introduction of the merchandise into the country. Whether that must

[4] It relates to smuggled goods "to be recovered from any person described in the first or second paragraph of this section"—that is, any person (1) who "knowingly and willfully, with intent to defraud the United States" smuggles merchandise into this country which should have been invoiced, or (2) who "fraudulently or knowingly imports or brings into the United States" any merchandise contrary to law, or facilitates the importation of same.

be proof beyond a reasonable doubt, as required in a criminal case—in which event the doctrine of *res judicata* based on the prior acquittal would be applicable—or merely proof by a preponderance of the evidence—in which event *res judicata* would not apply—turns on the nature of the forfeiture remedy. It is here that the relationship between the decision in *Coffey* v. *United States*, 116 U.S. 436, and such decisions as *Helvering* v. *Mitchell*, 303 U.S. 391, becomes significant.

In *Coffey*, it was determined that an acquittal of violations of various revenue laws, dealing specifically with the evasion of taxes imposed on distilled spirits, constituted a bar to a subsequent forfeiture proceeding involving the same fraudulent acts alleged in a prior criminal indictment. The decision seems to have turned on the peculiar construction of the statute that was there involved, so that the holding applies only to forfeitures which are dependent upon, and a direct consequence of, a conviction. See *Stone* v. *United States*, 167 U.S. 178, 186. If this is so, an application of *Coffey* to a forfeiture proceeding under Section 545, without regard to the purpose of that provision, is contrary to the congressional intent. Congress was aware of the *Coffey* opinion when it enacted 18 U.S.C. 545, and it so phrased the forfeiture clause to avoid the conclusion that forfeiture was dependent upon conviction. H. Rep. No. 304, 80th Cong., 1st Sess., p. A46. Accordingly, it seems evident that Congress thought of forfeiture under Section 545 as providing a remedy different in kind from the criminal sanc-

tion, and that it intended to permit civil forfeiture on a lesser showing of criminal involvement than would be necessary for criminal conviction.

The fact that Section 545 forfeiture is contained in the same statute which provides criminal penalties is not decisive as to whether it is to be deemed punitive or remedial. Nor is it determinative that both the criminal and civil sanctions are based on the same transaction. Cf. *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.), affirmed, 376 U.S. 782.[5] As this Court stated in *Helvering* v. *Mitchell, supra,* 303 U.S. at 399: "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense." See also *Rex Trailer Co.* v. *United States, supra,* 350 U.S. at 150–151. Thus, one must look instead, to the essential nature of the forfeiture proceeding, that is, to whether it is civil or penal.

Forfeiture of the illegally imported merchandise involved in this case does serve a very definite re-

[5] The statute involved there, 18 U.S.C. 1084, like that involved here, provided both criminal sanctions (for the transmission of wagering information by wire communication facilities) and a civil sanction. Subsection (d) provided for the discontinuance of, or refusal to grant, facilities and services provided by a common carrier under the jurisdiction of the Federal Communications Commission. Conceding that telephone service was a property right protected by the Fifth Amendment, the court nevertheless concluded that Subsection (d) did not impose a criminal penalty, but rather a civil, preventative, sanction.

medial purpose. It preserves the integrity of the United States patent laws and regulations that forbid the entry of unlawfully imported Furazolidone into the domestic market without first obtaining a bond from customs officials (see n. 1, *supra*). Cf. *Rex Trailer Co.* v. *United States*, *supra*, 350 U.S. 153. In addition, it serves to defray expenses incurred by the government in investigating and monitoring such customs law violations. Cf. *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 401. And finally it furthers the underlying purpose of Section 545 itself, which is to control the nature and quantity of merchandise coming into the United States from other countries so that this country's trade, economic and foreign policies will not be frustrated or impeded. Cf. *United States* v. *Alcatex, Inc.*, *supra*, 328 F. Supp. at 132.

Congress, we think, embodied the "punitive criminal element" (*Helvering* v. *Mitchell*, *supra*, 303 U.S. at 399) of Section 545 in the specific criminal sanctions; the separate forfeiture clause was intended to be broadly remedial. The decision below to the contrary, which returns to the owner in the United States merchandise that cannot lawfully be imported for domestic use, could well have broad ramifications in other areas under the customs laws, such as, for example, with respect to the illicit trafficking of drugs and narcotics. Hence, the issue is an important one which this Court should consider.

CONCLUSION

The decision below of the Eighth Circuit is in direct conflict with a decision of the First Circuit; it raises serious questions concerning the proper enforcement of the customs laws by civil forfeiture proceedings which we believe require resolution by this Court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
HENRY E. PETERSEN,
Acting Assistant Attorney General.
WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
SHIRLEY BACCUS-LOBEL,
Attorneys.

NOVEMBER 1971.

449-904—71—3

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 71-1329

UNITED STATES OF AMERICA, APPELLANT

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE, DEFENDANT

AND

ALVIN L. MALZ, INTERVENOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

Before VAN OOSTERHOUT, MEHAFFY and GIBSON, Circuit Judges.

PER CURIAM.

On June 14, 1971 appellee Alvin L. Malz, as intervenor, filed a motion for summary affirmance under local Rule 8. Appellee contends that the district court's ruling is correct and does not present a substantial question for review. The district court ruled that appellee's acquittal of a two-count indictment alleging violations of 18 U.S.C. § 545 was a bar to any subsequent forfeiture action under this section, relying primarily on *Coffey v. United States*, 116 U.S. 436 (1886).

The court has carefully reviewed the motion and the original records of the district court and finds the motion for summary affirmance should be granted under local Rule 8.

It is so ordered.

APPENDIX B

JUDGMENT

In the United States Court of Appeals for the Eighth Circuit

September Session, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

This Cause came on to be heard on the original files of the United States District Court for the District of North Dakota without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the motion for summary affirmance should be granted under Local Rule 8.

JULY 13, 1971.

APPENDIX C

United States Court of Appeals for the Eight Circuit

No. 71-1329

September Term, 1970

UNITED STATES OF AMERICA, APPELLANT

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

The Court having considered petition of appellant for rehearing en banc and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

AUGUST 20, 1971.

APPENDIX D

In the United States District Court

for the District of North Dakota

Northeastern Division

CIVIL No: 4572

UNITED STATES OF AMERICA, PLAINTIFF

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE, DEFENDANT

and

ALVIN L. MALZ, INTERVENOR

MEMORANDUM OPINION

This forfeiture action was commenced by the United States against 201 fifty-pound bags of Furazolidone seized within the District of North Dakota by agents of the Bureau of Customs, United States Treasury Department, from one Alvin L. Malz. Jurisdiction is predicated upon 28 U.S.C.A. § 1355.

Alleging that the Furazolidone had been introduced into the United States from a contiguous territory without having been reported to any customs official, in violation of 19 U.S.C.A. § 1459, and that the merchandise had been smuggled and clandestinely introduced into the United States, in violation of 18 U.S.C.A. § 545, forfeiture is sought pursuant to both 19 U.S.C.A. § 1460 and 18 U.S.C.A. § 545.

Contending that he was the owner of the Furazolidone and had a proprietary interest therein, Malz moved to intervene as a party defendent. The motion, not opposed by the plaintiff, was granted and there is now pending the intervenor's motion for summary judgment and for return of the seized merchandise. Before reaching the merits of the intervenor's motion it is necessary to consider the contention of the Government, in opposition thereto, that the motion is "* * * prematurely sought in that the Complaint for Forfeiture is procedurally brought under the Admiralty and Maritime Claims Section of the Federal Rules of Civil Procedure, * * *" and that the requisite verified claim has not been filed. Supplemental Rules for Certain Admiralty and Maritime Claims, rule C(6).

Rule A of the Supplemental Rules provides that:

> "These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) [1] with respect to the following remedies:
> * * *
> "(2) Actions in rem;
> * * *
> "The general Rules of Civil Procedure for the United States District Courts are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."

Since a motion for summary judgment pursuant to Fed. Rules Civ. Proc. rule 56 may be made at any time by an adverse party and as such motion stays proceedings until such time as it is either granted or

[1] Federal Rules of Civil Procedure.

denied, it would not be inconsistent to consider a Rule 56 motion prior to requiring compliance with the Supplemental Rules for Certain Admiralty and Maritime Claims.[2]

In support of his motion for summary judgment and return of the Furazolidone, Malz has submitted a certified copy of a judgment entered on January 15, 1970, in the United States District Court, District of Minnesota, after a jury trial in which he was found not guilty as to Counts I and II of an indictment charging him with violations of 18 U.S.C.A. § 545, that is, the offenses of having smuggled and clandestinely introduced into the United States merchandise which should have been invoiced (the Furazolidone) and of having received, concealed and facilitated the transportation after importation of the merchandise (the Furazolidone) which had been brought into the United States contrary to law.

Citing *Coffey v. United States,* 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684, Malz takes the position that his acquittal of the two-count indictment charging § 545 violations is a bar to any subsequent forfeiture proceedings under that or any other forfeiture section.

The intervenor's position is well taken. While *Coffey* has been criticized, distinguished and questioned an analysis of those cases is not persuasive in view of *United States v. One DeSoto,* 180 F.2d 583, and *United States v. One Ford,* 272 F.2d 704. "Any departure from Coffey and its 'uncritical language' must come from the Supreme Court. We are bound

[2] The conclusion reached on the motion for summary judgment makes it unnecessary to decide if the Supplemental Rules for Certain Admiralty and Maritime Claims apply in an action of this nature. See Fed. Rules Civ. Proc. rule 9(h).

by the rule therein announced." (Footnotes omitted) *United States v. One Ford*, supra.

With respect to the Government's reliance upon 19 U.S.C.A. § 1460 as an alternate basis for forfeiture of the Furazolidone, the short answer is that if Congress intended to provide such an alternate procedure to that contained in 18 U.S.C.A. § 545 when a violation thereof is alleged, it could have set forth, as it did in 18 U.S.C.A. § 545, a reservation that "nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law."

The Government, having elected to proceed against Malz in the prosecution of 18 U.S.C.A. § 545, is restricted to the forfeiture provisions contained therein, and the intervenor having been acquitted of violating that section *Coffey* is a bar to forfeiture of the Furazolidone. Now, therefore,

IT IS ORDERED that the motion of Alvin L. Malz for summary judgment and return of the 201 fifty-pound bags of Furazolidone, be and the same hereby is granted. Counsel for Malz will prepare and submit form of judgment through the Clerk of this Court.

Dated this 5th day of May, A.D. 1971.

RONALD N. DAVIES,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE 1971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-672

UNITED STATES OF AMERICA,
Petitioner,

vs.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN C. HUMPAGE
HUMPAGE & STEWART
314 West 7th Street
Topeka, Kansas 66603
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below	1
Jurisdiction	2
Question Presented	2
Additional Statutes Considered	2
Statement	4
Argument in Opposition to Granting Writ	4
Conclusion	8
Appendix A	A1
Appendix B	A2
Appendix C	A3
Appendix D	A4
Appendix E	A8

Cases

Ashe v. *Swenson*, 397 U.S. 436, 444	7
Coffey v. *United States*, 116 U.S. 436	4, 6, 7
Helvering v. *Mitchell*, 303 U.S. 391	7
Leiser v. *United States*, 234 F.2d 648 (1st Cir. 1956)	4, 5
O'Connor v. *Ohio*, 385 U.S. 92	7
United States v. *One Ford*, 272 F.2d 704 (10th Cir. 1959)	5, 7
United States v. *One DeSoto*, 180 F.2d 583 (4th Cir. 1950)	5, 7

ADDITIONAL STATUTES

19 U.S.C. 1497 ..... 4, 5
19 U.S.C. 1498 5
21 U.S.C. 881 ..... 2, 7
21 U.S.C. 964 ..... 3, 7

MISCELLANEOUS

33 F.R. 12680 (T.D. 68-225) 4
H.Rep. No. 304, 80th Cong., 1st Sess. 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-672

UNITED STATES OF AMERICA,
Petitioner,

vs.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

The petitioner petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, p. A1) is not yet reported. The opinion of the district court (App. D, infra, pp. A4-A7) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, infra, p. A2) was entered on July 13, 1971. A petition for rehearing was denied on August 20, 1971. (App. C, infra, p. A3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an acquittal of the owner of merchandise on criminal charges alleging unlawful importation of that merchandise into the United States, in violation of 18 U.S.C. 545, bars a subsequent civil forfeiture proceeding directed against the same property that was the subject of the criminal action.

ADDITIONAL STATUTES CONSIDERED

Section 881 of Title 21, United States Code, provides, in pertinent part:

§881. Forfeitures—Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

Section 964 of Title 21, United States Code, provides, in pertinent part:

§964. Additional penalties

Any penalty imposed for violation of this subchapter shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

STATEMENT

Pursuant to the Court's Rule 40(3) and with the sincere hopes of eliminating duplicity, the Petitioner's statement of the case is basically accurate, save he failed to inform the Court that the civil forfeiture commenced herein was belatedly filed and only accomplished after considerable urging by the Respondent (App. E, pp. A8-A10).

The Petitioner now additionally advises the Court for the first time, (fn. p. 5), of the protection afforded Norwich Pharmacol, by the Bureau of Customs, 19 U.S.C. 1337(f) 33 F.R. 12680 (T.D. 68-225) (App. D, pp. A4-A7).

The Petitioner additionally attempts to minimize the wisdoms of the Trial Court and the United States Court of Appeals for the Eighth Circuit, by limiting both tribunals' decision to *Coffey* v. *United States*, 116 U.S. 436. It is unassailable that both courts additionally relied on the reasoning displayed in *U. S.* v. *One Ford*, 272 F.2d 704 (10th Cr. 1959); *U. S.* v. *One DeSoto*, 180 F.2d 583 (4th Cr. 1950) (Apps. A and E, pp. A1 and A8-A10).

ARGUMENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

In perusing the Petitioner's Petition filed herein seeking Certiorari, it readily appears that it is urged upon the Court that the decision of the trial court and the Eighth Circuit Court of Appeals (Apps. A, B, E, pp. A1, A2, A8-A10), is in conflict with the reasonings of the First Circuit Court of Appeals, *Leiser* v. *U. S.*, 234 F.2d 648. This statement is made with the hopes of enjoying the Court's CONSIDERATIONS, Rule 19(1b). The forfeiture in *Leiser*, supra, was obtained under 19 U.S.C. 1497, which clearly would not be in conflict with the Eighth, Fourth, or Tenth Circuits Courts of Appeals wisdoms viewed herein, as the

Second Count in *Leiser*, supra, clearly alleged violations of 19 U.S.C. 1497 and 1498; the Court stating, "in both cases he was charged with violating that section", p. 650. Had the Indictment herein included an allegation of a violation of 19 U.S.C. 1460; or possibly as the trial court suggested, a violation of 18 U.S.C. 542, rather than singularly relying on the forfeiture provisions contained in 18 U.S.C. 545, the trial court's reasoning herein, "is restricted to the forfeiture provisions contained in 18 U.S.C. 545", may well have been different. The Petitioner, had he utilized the provisions found in these Statutes, may well have been allowed to commence and succeeded in forfeiting the merchandise herein under the provisions of 19 U.S.C. 1460, or 18 U.S.C. 542.

It readily appears the thinkings expressed by the Eighth Circuit Court of Appeals, is readily expressed and approved in both the Tenth Circuit Court of Appeals and the Fourth Circuit Court of Appeals, *United States* v. *One Ford*, 272 F.2d 704 (10th Cr. 1959); *United States* v. *One DeSoto*, 180 F.2d 583 (4th Cr. 1950), it would therefore appear that the Petitioner would be hard put to enjoy the considerations announced by the Court in its Rule 19(1b).

The Petitioner seeks to suggest to the Court in several instances that "STARE DECISIS, FUNDAMENTAL FAIRNESS, COLLATERAL ESTOPPEL, SAME EVIDENCE TEST" be repudiated or denied and that the Court should now condone "MULTIPLICITY OF PROSECUTION" for the same ACT.

The Petitioner does not, nor is it possible, suggest that the Furazolidone, the merchandise herein, was not the subject matter of the Respondent's criminal prosecution (App. E, pp. A8-A10). He suggests to the Court that an easy disposition herein would be for the Court to allow for a forfeiture under the purview of 19 U.S.C. 1460, without

benefit of STARE DECISIS. It would equally be quite easy for the Court and far less expensive to society, not to mention removing many troublesome areas for the Court to eliminate all appeals, both criminal and civil, however, I would consider the suggestion on my part quite rash, particularly when it also is made without portfolio.

The Petitioner suggests that if the decision of the Court in *Coffey* v. *United States*, supra, is the law, which it is, then they are compelled to elect to seek a forfeiture of the merchandise, 18 U.S.C. 542, or to institute criminal prosecution, 18 U.S.C. 545. Their position is somewhat weak and hardly well taken in that *Coffey*, supra, mandates that they can have both, providing they obtain a conviction, if they proceed under 18 U.S.C. 545.

The Petitioner suggests the merchandise herein was illegally imported merchandise, which a jury of the Respondent's peers found to the contrary on January 15, 1970 (App. D, pp. A4-A7). The Petitioner then commences to replace the contemporaneous objection rule by suggesting to the Court, for the first time, that the mandates of *Coffey*, supra, are in conflict with H.Rep. No. 304, 80th Cong., 1st Sess.; again assuming the merchandise was illegally imported herein; it overrides the integrity of the United States Patent Laws and Regulations; frustrates this Country's trade; economic and foreign policies; encourages the illicit trafficking of drugs and narcotics. The Petitioner aptly states that *Coffey*, supra, was decided and that Congress was aware of the decision when it enacted 18 U.S.C. 545. I think *Coffey*, supra, mandates may well have been reckoned with by Congress, if Congress so desired, as readily suggested by the able Trial Court and the United States Court of Appeals for the Eighth Circuit. If Congress had intended to minimize or

eliminate the fiats expressed in *Coffey*, supra, it would have done so. It would have been a simple proceeding to include in the provisions of 18 U.S.C. 545, the verbiage suggested by the able trial court. (App. D, pp. A4-A7). I think in addition the Petitioner would be hard put to develop these reasonings at this point, particularly in considering the date of the three cases relied on by the lower Courts herein, *Coffey*, 1886; *United States* v. *One Ford*, 1959; *United States* v. *One DeSoto*, 1950. The Petitioner could hardly claim the blessing bestowed by the Court in *O'Connor* v. *Ohio*, 385 U.S. 92.

The Petitioner seeks the Court's ear, however, prefers not its eye, when it suggests that the Court reverse *Coffey*, supra, as the decision could have broad ramifications, "illicit trafficking in drugs and narcotics." May I suggest to the Petitioner that in situations of that nature, it utilize the provisions of 21 U.S.C. 881, 21 U.S.C. 964.

I take no exception to the pronouncements of the Court in *Helvering* v. *Mitchell*, 303 U.S. 391. The Court very clearly distinguished its reasoning from *Coffey*, supra, and specifically held that Coffey WAS NOT OVERRULED. The reasoning viewed in *Helvering*, supra, clearly bespeaks the Petitioner's reasoning in not attempting to obtain the Court's considerations under its Rule 19(1).

It is equally interesting to note that with all of the castigation directed against *Coffey*, supra, by the Petitioner, we find it cited and approved by the Court on April 6, 1970. *Ashe* v. *Swenson*, 397 U.S. 436, 444, fn. 7.

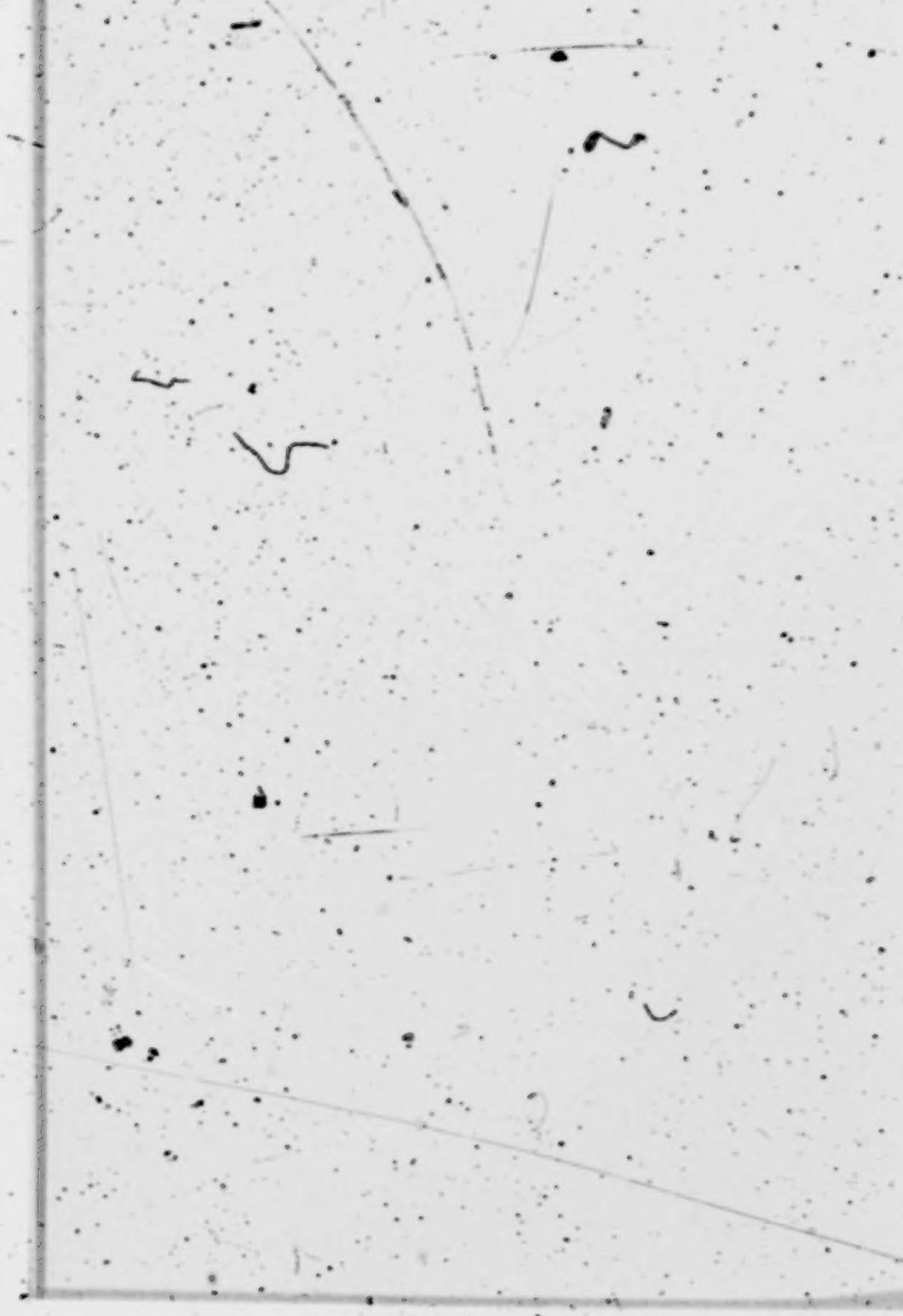
CONCLUSION

The decision of the Eighth Circuit Court of Appeals is not in conflict with the First Circuit Court of Appeals; it readily concurs with the Fourth and Tenth Circuits Courts of Appeals. The Petition viewed herein raises no germane question, at this point, of the customs laws; the Eighth Circuit Court of Appeals' Opinion, further shores our jurisprudence by its compliance and acknowledgement of STARE DECISIS, by not avoiding, repudiating, denying or misstating same, as the Petitioner now suggests to this Honorable Court. The Respondent respectfully suggests that the Petition is without merit and to hopefully protect a vestige of our jurisprudence that the Writ of Certiorari be denied.

Very respectfully submitted,

JOHN C. HUMPAGE
HUMPAGE & STEWART
314 West 7th Street
Topeka, Kansas 66603
Phone: 235-3477 (913)
Attorneys for Respondents

APPENDIX



APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 71-1329

UNITED STATES OF AMERICA,
Appellant,

v.

Two Hundred and One Fifty-Pound Bags of Furazolidone,
Defendant,

and

Alvin L. Malz, Intervenor,
Appellee.

Appeal from the United States District Court for the District of North Dakota

Before Van Oosterhout, Mehaffy and Gibson, Circuit Judges.

PER CURIAM.

On June 14, 1971, appellee Alvin L. Malz, as intervenor, filed a motion for summary affirmance under local Rule 8. Appellee contends that the district court's ruling is correct and does not present a substantial question for review. The district court ruled that appellee's acquital of a two-count indictment alleging violations of 18 U.S.C. §545 was a bar to any subsequent forfeiture action under this section, relying primarily on Coffey v. United States, 116 U.S. 436 (1886).

The court has carefully reviewed the motion and the original records of the district court and finds the motion for summary affirmance should be granted under local Rule 8.

It is so ordered.

APPENDIX B

Judgment

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Session, 1971

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ, INTERVENOR,
Appellees.

On Appeal from the United States District Court
for the District of North Dakota

This Cause came on to be heard on the original files of the United States District Court for the District of North Dakota without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the motion for summary affirmance should be granted under Local Rule 8.

July 13, 1971.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1329

September Term, 1970

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE FIFTY-POUND BAGS OF FURAZOLIDONE AND ALVIN L. MALZ,
INTERVENOR,
Appellee.

Appeal from the United States District Court
for the District of North Dakota

The Court having considered petition of appellant for rehearing en banc and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

August 20, 1971.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

Civil No. 4572

UNITED STATES OF AMERICA,
Plaintiff,

v.

TWO HUNDRED AND ONE FIFTY-POUND
BAGS OF FURAZOLIDONE,
Defendant,

and

ALVIN L. MALZ,
Intervenor.

Memorandum Opinion.

This forfeiture action was commenced by the United States against 201 Fifty-pound bags of Furazolidone seized within the District of North Dakota by agents of the Bureau of Customs, United States Treasury Department, from one Alvin L. Malz. Jurisdiction is predicated upon 28 U.S.C.A. §1355.

Alleging that the Furazolidone had been introduced into the United States from a contiguous territory without having been reported to any customs official, in violation of 19 U.S.C.A. §1459, and that the merchandise had been smuggled and clandestinely introduced into the United States, in violation of 18 U.S.C.A. §545, forfeiture is sought pursuant to both 19 U.S.C.A. §1460 and 18 U.S.C.A. §545.

Contending that he was the owner of the Furazolidone and had a proprietary interest therein, Malz moved to in-

tervene as a party defendant. The motion, not opposed by the plaintiff, was granted and there is now pending the intervenor's motion for summary judgment and for return of the seized merchandise. Before reaching the merits of the intervenor's motion, it is necessary to consider the contention of the Government, in opposition thereto, that the motion is "* * * prematurely sought in that the Complaint for Forfeiture is procedurally brought under the Admiralty and Maritime Claims Section of the Federal Rules of Civil Procedure, * * *" and that the requisite verified claim has not been filed. Supplemental Rules for Certain Admiralty and Maritime Claims, rule C(6).

> Rule A of the Supplemental Rules provides that:
> "These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h)[1] with respect to the following remedies:
>
> * * *
>
> "(2) Actions in rem;
>
> * * *
>
> "The general Rules of Civil Procedure for the United States District Court are also applicable to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules."

Since a motion for summary judgment pursuant to Fed. Rules Civ. Proc. rule 56 may be made at any time by an adverse party and as such motion stays proceedings until such time as it is either granted or denied, it would not be inconsistent to consider a Rule 56 motion prior to

---

1. Federal Rules of Civil Procedure.

requiring compliance with the Supplemental Rules for Certain Admiralty and Maritime Claims.[2]

In support of his motion for summary judgment and return of the Furazolidone, Malz has submitted a certified copy of a judgment entered on January 15, 1970, in the United States District Court, District of Minnesota, after a jury trial in which he was found not guilty as to Counts I and II of an indictment charging him with violations of 18 U.S.C.A. §545, that is, the offenses of having smuggled and clandestinely introduced into the United States merchandise which should have been invoiced (the Furazolidone) and of having received, concealed and facilitated the transportation after importation of the merchandise (the Furazolidone) which had been brought into the United States contrary to law.

Citing Coffey v. United States, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684, Malz takes the position that his acquittal of the two-count indictment charging §545 violations is a bar to any subsequent forfeiture proceedings under that or any other forfeiture section.

The intervenor's position is well taken. While Coffey has been criticized, distinguished and questioned an analysis of those cases is not persuasive in view of United States v. One DeSoto, 180 F.2d 583, and United States v. One Ford, 272 F.2d 704. "Any departure from Coffey and its 'uncritical language' must come from the Supreme Court. We are bound by the rule therein announced." (Footnotes omitted) United States v. One Ford, supra.

With respect to the Government's reliance upon 19 U.S.C.A. §1460 as an alternate basis for forfeiture of the

---

2. The conclusion reached on the motion for summary judgment makes it unnecessary to decide if the Supplemental Rules for Certain Admiralty and Maritime Claims apply in an action of this nature. See Fed. Rules Civ. Proc. Rule 9(h).

Furazolidone, the short answer is that if Congress intended to provide such an alternate procedure to that contained in 18 U.S.C.A. §545 when a violation thereof is alleged, it could have set forth, as it did in 18 U.S.C.A. §542, a reservation that "nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law."

The Government, having elected to proceed against Malz in the prosecution of 18 U.S.C.A. §545, is restricted to the forfeiture provisions contained therein, and the intervenor having been acquitted of violating that section Coffey is a bar to forfeiture of the Furazolidone. Now, therefore,

IT IS ORDERED that the motion of Alvin L. Malz for summary judgment and return of the 201 fifty-pound bags of Furazolidone, be and the same hereby is granted. Counsel for Malz will prepare and submit form of judgment through the Clerk of this Court.

Dated this 5th day of May, A.D. 1971.

/s/ Ronald N. Davies,
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 71-1329

UNITED STATES OF AMERICA,
Appellant,

v.

TWO HUNDRED AND ONE, FIFTY POUND BAGS
OF FURAZOLIDONE,
Defendant,

and

ALVIN L. MALZ,
Intervenor-Appellee.

Appeal from the United States District Court
for the District of North Dakota.

Intervenor-Appellee's Objection to an Additional Stay

Comes now the Intervenor-Appellee, by and through his attorneys, Frank Knox and John C. Humpage, and respectfully objects to the Appellant's Motion for an additional Stay of the Court's Mandate herein, for the following reasons:

The Intervenor-Appellee respectfully shows to the Court that the Court granted the Appellant's request Staying the Court's Mandate on August 31, 1971, for a period of thirty (30) days, prefaced on the Appellant's Petitioning the United States Supreme Court for a Writ of Certiorari, providing proof of same with the Clerk of this Court. The Appellant thereafter filed a Second Motion requesting an additional Stay Order of thirty (30) days

on the grounds that the Application to the United States Supreme Court still remains under consideration by the Department of Justice. The Intervenor-Appellee respectfully shows to the Court in his Affidavit, filed in the United States District Court; and the attachments thereto, R. January 8, 1971, that this matter has been under consideration by the Department of Justice since June 27, 1969, and additionally came into being by the Intervenor-Appellee's letter under date of July 13, 1970, wherein the Intervenor-Appellee forwarded his draft, in the amount of $250.00, which was returned, to serve as a Bond to institute the proceedings herein.

The Intervenor-Appellee's attachment to his Affidavit, part of the Record herein, more particularly Exhibits "A", "B", "C", "D", "E", and "F", clearly bespeaks the efforts expended by the Intervenor-Appellee to cause the institution of the proceedings herein that the Appellant now seeks to additionally stay.

The Intervenor-Appellee also advises the Court that the market value of the merchandise seized by the Government is rapidly decreasing in value and any additional stay may well cause additional irreparable harm to the Intervenor-Appellee.

The Intervenor-Appellee additionally respectfully shows to the Court that the determination by the Department of Justice to Petition the United States Supreme Court for Certiorari was alleged and used in their first Motion asking the Court to stay its Mandate, and now could hardly be construed as "GOOD CAUSE" in seeking their second Stay Order, as Mandated by Rule 41(b) of the Federal Rules of Appellate Procedure. This position was used in their initial Motion filed herein, wherein they assured the Court that the Stay Order sought and obtained

was prefaced on their desire to seek Certiorari. It now appears the assurance as contained in the Appellant's first Motion for a Stay Order was incorrect, as they failed to Petition the United States Supreme Court and now base their second request for a stay of the Court's Mandate on the grounds that that Application "remains under the consideration of the Department of Justice", which clearly could not be considered as good cause.

WHEREFORE, the Intervenor-Appellee respectfully beseeches the Court to deny the Appellant's request for a second Stay of the Court's Mandate for the reasons enumerated above and foregoing.

/s/ John C. Humpage